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BEFORE THE PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: INFORMAL MEETING/WORKSHOP RE: PETITION OF
IMC AGRICO FOR A DECLARATORY STATEMENT
CONFIRMING NON-JURISDICTIONAL NATURE OF
PLANNED SELF-GENERATION

DOCKET NO.: 971313

HELD BEFORE: RICHARD C. BELLAK
Associate General Counsel

DATE: Monday; November 17, 1997

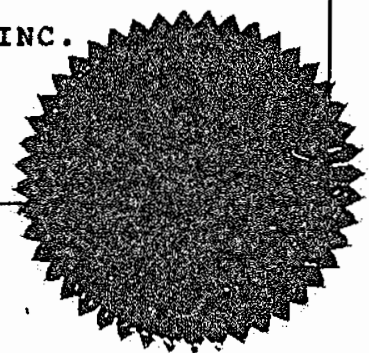
TIME: Commenced: 1:05 p.m.
Concluded: 2:06 p.m.

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Room 309
Tallahassee, Florida

REPORTED BY: Laurie L. Gilbert
Registered Professional Reporter
Certified Court Reporter
Certified Realtime Reporter
Notary Public in and for the
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APPEARANCES:

**REPRESENTING THE
PUBLIC SERVICE COMMISSION:**

RICHARD C. BELLAK, ESQUIRE
Associate General Counsel
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JOE JENKINS
LESLIE PAUGH

* * *

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P R O C E E D I N G S

1
2 MR. BELLAK: Good afternoon.

3 Pursuant to the notice -- the memorandum
4 that we sent on November 12th, 1997, we wanted
5 to schedule a meeting among parties and other
6 interested persons with respect to this docket,
7 97-1313.

8 When we first started working on it, I --
9 I noticed that I was getting a lot of feedback
10 from various interested persons, and some
11 filings to the effect that this was not in some
12 ways the usual petition for declaratory
13 statement, and there were numerous opinions
14 offered as to how it departed from the norm,
15 and what procedural kinds of allowances should
16 be made for that.

17 I felt that it would be useful if we got
18 the suggestions from as many people that wanted
19 to contribute to that dialogue as were pleased
20 to do so.

21 So I welcome you to this meeting. I don't
22 know if everyone here wishes to speak, or
23 simply to listen to what others are saying.
24 But I would suggest that we'll simply go around
25 the room in order.

1 And before you -- you give your comments,
2 I'd appreciate it if you'd identify yourself,
3 and on whose behalf you are speaking.

4 The notice talks about the procedural
5 element of this. I -- I understand that in
6 addressing the procedural element, you will
7 want to talk to some extent about the substance
8 so as to give an indication of where -- what
9 direction you're heading in, and that's
10 perfectly appropriate.

11 So why don't we just start going this way
12 around the table.

13 MR. McWHIRTER: My name is John McWhirter,
14 and I'm here representing IMC Agrico, which is
15 the petitioner in the proceeding.

16 As I understand it, we're limiting the
17 discussion to the self-generation petition?

18 MR. BELLAK: I think it's -- it's an
19 informal discussion. If you want to go beyond
20 that, that's not a problem.

21 MR. McWHIRTER: Well, our position is very
22 simplistic. The -- the law is very clear that
23 customers are entitled to self-generate. The
24 only thing that gives us any doubt is the
25 business structure that's used for

1 self-generation, whether we do it with internal
2 capital or devise another approach to the
3 financing.

4 And in this case, the approach that's been
5 chosen is very similar to, if not exactly the
6 same, as the approach that's been previously
7 approved by the Commission in the Seminole
8 case, and to a great degree in the Monsanto
9 declaratory statements.

10 What we've done is there will be assets
11 that will be transferred from IMC Agrico to a
12 limited partnership. IMC Agrico will be a
13 general partner of that partnership, and will
14 have control of the assets. We'll assume all
15 the risks that are incident to operation of
16 120 megawatts of the power plant.

17 For economies of scale, we've entered into
18 an arrangement with Duke Energy Power Services,
19 which is a company that wants to build a
20 merchant plant in Florida.

21 And if the Commission approves, we would
22 like to jointly build a facility which will be
23 a little bit larger and, as a result, will be
24 able to operate more efficiently, and achieve
25 better results in keeping with the Commission's

1 conservation policies and rules.

2 So the single issue that we are asking you
3 to approve in our petition is whether or not
4 the business structure constitutes
5 self-generation, and then removes the
6 IMC Agrico component of this plant from the
7 Commission's jurisdiction and regulation.

8 We strongly feel that the declaratory
9 judgment -- or declaratory petition process is
10 the appropriate process. It addresses only the
11 single needs of IMC Agrico. It's -- you're not
12 developing a theory of general statewide
13 policy, you're not establishing significant
14 precedent by the ruling on the specific
15 character of our operation.

16 And we feel that the most important thing
17 to us is that the issue be restricted to our
18 petition about which there's no material
19 factual dispute; and, secondly, that you adhere
20 to the normal time line for dispositions of
21 declaratory statements as provided in the
22 statute.

23 And we sincerely hope that the Commission
24 will not allow the proceeding to become a
25 chaotic proceeding in which a lot of people

1 come in and attempt to intervene in the case.
2 It's really one that deals only with our
3 business structure aspect.

4 I think that's essentially it from our
5 viewpoint. We welcome all these other people
6 who've come to help with us our petition, and
7 to enlighten as to what it's about.

8 One of the things it's not about is what
9 Tampa Electric's revenue requirements are going
10 to be after the turn of the century in this
11 plant. It's about the business structure of
12 our self-generation proposal.

13 MR. BELLAK: Thank you.

14 MR. MCGEE: We -- my name is Jim McGee.
15 I'm here on behalf of Florida Power
16 Corporation.

17 Florida Power submitted a petition to
18 intervene. It was actually filed on Friday.

19 And I understand, as John says, that
20 customers are allowed to self-generate. But
21 that -- I guess, really is the issue that's
22 raised in this proceeding as to whether the
23 fairly complicated proposal that IMC is putting
24 forward represents self-generation, or whether
25 it's some form of a retail sale.

1 As we read the precedent in the cases that
2 Mr. McWhirter cites, the emphasis that the
3 Commission has placed in the past is on the
4 transfer of interests that are of the -- that
5 are in the nature of ownership interests that
6 are being transferred from the owner of the
7 facility to the consumer of the output from
8 that facility.

9 If it was a case of true self-generation,
10 like some of the other co-gen operations that
11 are used by IMCA, you'd have a complete
12 identity of interest between the owner of the
13 facility and the consumer, and we wouldn't have
14 the issues that are presented to the
15 Commission.

16 Here we have one entity who owns the
17 facility, and we have IMCA who will consume --
18 and they are different entities, so I think
19 it's appropriate that critical attention on
20 the -- how the risks of ownership are being
21 transferred.

22 And unfortunately, we haven't been able to
23 determine how the risk of ownership will be
24 transferred because they aren't presented in
25 the petition. There's some general references

1 to how that will take place.

2 So from a procedural standpoint,
3 Florida Power thinks it's important that we
4 have, first, the opportunity to participate in
5 the proceeding because if it, in fact, is not a
6 case of self-generation, then this will
7 represent sales to a retail customer of
8 Florida Power's.

9 So, number one, we'd have to have the
10 opportunity to participate.

11 And number two, we have to have the
12 procedural needs to be able to explore the --
13 and develop the information necessary for the
14 Commission to determine whether or not the --
15 an ownership interest passes to IMCA through
16 this lease. They allege that in their
17 petition, and we aren't able to determine that
18 from what's been provided so far. We need the
19 opportunity to develop that.

20 MR. DOLAN: No comment.

21 COURT REPORTER: Your name, sir?

22 MR. DOLAN: Vinny Dolan. Florida Power.
23 I don't have any comment.

24 COURT REPORTER: I still have to write
25 that down. And I have to identify, sir.

1 MR. SASSO: I'm Gary Sasso. I'm from
2 Carlton, Fields also representing
3 Florida Power Corporation.

4 MR. WRIGHT: My name is
5 Robert Scheffel Wright. I'm an attorney with
6 Landers & Parsons here in Tallahassee. I
7 represent Duke Energy Power Services, comma,
8 LLC.

9 Duke Energy is the joint venture partner
10 of IMC Agrico with respect to this project, and
11 the Duke entity would, as explained in our
12 petitions, lease the balance of the plant's
13 capacity that is not used by IMCA for its own
14 self-generation purposes, and sell that power
15 on a merchant basis to the wholesale market.

16 I really don't have anything to add to the
17 comments by my colleague, Mr. McWhirter. And I
18 agree with everything he said.

19 MR. GUYTON: My name is Charlie Guyton.
20 I'm with the law firm of Steel, Hector &
21 Davis. We represent Florida Power & Light
22 Company, who has not yet petitioned to
23 intervene in this case.

24 MR. KESSEL: I'm Roger Kessel representing
25 Tampa Electric Company.

1 We have intervened in this case. We do
2 not believe that the -- the record is adequate
3 to grant the relief requested, mainly a
4 determination that the project as described in
5 the petition constitutes self-generation.

6 Indeed, we think that the -- the
7 assertions are so generalized and at such a
8 high level of description, that it really
9 constitutes a request to -- amounts to almost a
10 resolution in the sense of seeking
11 authorization for something that has not yet
12 been fully described.

13 The -- we believe that it's more likely
14 than not that the -- that when the facts
15 emerge, that the projects will constitute a
16 retail sale by Duke Energy. We believe that we
17 ought to be afforded the opportunity to
18 participate in proceedings to establish that
19 fact. Tampa Electric and its ratepayers have a
20 significant interest, because if the -- if,
21 in fact, it is a retail sale, there will be a
22 significant cost shifting to our ratepayers.
23 And if the ratepayers are not deemed to be
24 responsible then to Tampa Electric itself for
25 the -- for the revenue shortfalls.

1 This case constitutes a case of first
2 impression in the state. The Seminole case and
3 the -- the Monsanto case are purely financing
4 cases.

5 In each of those situations, Monsanto and
6 Seminole had complete and total control over
7 the project. They were the sole general
8 partners, they were the sole operators, and
9 they were purely financing devices.

10 This case involves an allocation of
11 interest in the project between IMCA and -- and
12 Duke. And it's of critical importance for a
13 determination as to whether or not a retail
14 sale is involved to look very closely at each
15 of the -- the arrangements and the definitive
16 agreements evidencing those arrangements
17 allocating the cost responsibility and risks,
18 control, and economic interests of the project.

19 For example, it would be of critical
20 importance to know that the market value of the
21 assets contributed by Seminole, in fact, are in
22 the same proportion to the claim like capacity;
23 that there is no opportunity for capacity
24 calls, or capacity give-ups; and that they be
25 fixed at the outset.

1 It's of critical importance to know
2 whether or not the lease term is co-extensive
3 with the economic life of the assets or not.
4 It's of critical importance to know whether or
5 not IMCA is assuming all the risks of
6 ownership, including the risks of
7 force majeure, or whether they are being laid
8 off on -- on Duke or affiliates of Duke.

9 And I could go on and on and on. But
10 that's not why we're here, to argue the
11 substance. But to point out to the Commission,
12 that in a case of such significance of this
13 case in terms of a direct challenge, we
14 believe, to the regulatory -- to the regulatory
15 framework of the state, that it is appropriate
16 to -- to enable those who can contribute to the
17 establishment of a kind of record that the
18 Commission needs, to be confident that it's
19 rendering an adequate decision, that we be
20 allowed to participate. Particularly when
21 there's no question that our interests, as a
22 regulated utility, and the interests of our
23 retail customers are directly and significantly
24 affected.

25 MR. WILLIS: I'm Lee Willis representing

1 Tampa Electric. I think that one thing that's
2 evident by the number of people that are here,
3 and by the calls that you've received is that
4 this is an extremely important case. It's a
5 watershed case. It's one that has the
6 potential of -- of shifting the regulatory
7 framework to some degree.

8 And it's extremely important that the
9 Commission have the input from the various
10 parties that are -- are directly affected by,
11 and that can provide you with -- with useful
12 information to help you develop both the facts
13 and the -- and the policy that'll be decided
14 here.

15 You -- the Commission has a -- a lot of
16 discretion with respect to how it allows
17 participation in declaratory judgment
18 proceedings, and in other proceedings.

19 And in this instance, I think there's no
20 question but that the importance of this, the
21 fact that it's a question of first impression,
22 we believe, speaks volumes for allowing full
23 participation.

24 I think that the petition also speaks
25 volumes for what's not alleged in it. I think

1 that Mr. Kessel outlined some of those things,
2 but there is a factual dispute about what is
3 the structure of this transaction. We've had a
4 cursory outline of what it is. And there are
5 innumerable ways that risks can be shifted and
6 settled in not so subtle ways. And those
7 things need to be explored.

8 In fact, we believe that you don't have
9 sufficient allegation of sufficient detail of
10 the particularity that's required of you to --
11 to reach a conclusion.

12 I'd also point out that there's been a lot
13 of discussion about the Monsanto case, the
14 Seminole fertilizer case. Well, those cases
15 were decided with respect to the particular
16 facts and circumstances before those particular
17 petitioners, and shouldn't be precedent for --
18 for someone else.

19 It -- either -- either they were -- just
20 dealt with that particular petitioner, or they
21 attempted to do something else and was not
22 really allowable in a petition for declaratory
23 statement.

24 In any event, whatever procedures that are
25 struck with this, it's very important that we

1 be allowed to participate, and that the
2 Commission give a thorough review of the
3 situation.

4 MR. BELLAK: Thank you.

5 Have you given any thought to the nature
6 of the hearing as between a 127.57(2) or a (1)
7 or --

8 MR. WILLIS: Well, we have discussed
9 that. We believe that it's the kind of
10 proceeding that really involves a factual
11 dispute of disputes of material fact, and a
12 full 120.57(1) hearing is -- is warranted in
13 this.

14 MR. BELLAK: Even though it's a
15 declaratory statement?

16 MR. WILLIS: Well, it -- we could call a
17 lot of things a declaratory statement. But
18 whether or not that's really what its nature
19 is, or should allow to stand as such, perhaps
20 the first action that should be considered is
21 whether it should be denied as such because of
22 failure to have a sufficient detail in it.

23 But it's extremely important to -- to
24 flesh out and understand and develop the facts
25 of what this proposed transaction is. There

1 are a lot of statements in it, and maybe it's
2 this and maybe it's that.

3 There's such things as there are going to
4 be co-partners. Well, what percentage and
5 what -- exactly what does that mean, which
6 is -- that one situation is very different than
7 Seminole Fertilizer where there was a single
8 general partner.

9 But facts like that I think could be --
10 could be best developed in a formal hearing.

11 MR. LONG: My name is Harry Long. I'm
12 representing Tampa Electric Company. And I'll
13 reserve comment for now.

14 Thank you.

15 MR. MCGLOTHLIN: My name is
16 Joe McGlothlin. With John McWhirter, I
17 represent IMC Agrico.

18 I'll rely on my partner's comments, except
19 to point out -- correct one statement by
20 Mr. Kessel when he said that Tampa Electric has
21 intervened. They filed a petition to
22 intervene. We filed a response to that in
23 opposition, and both those matters are pending
24 now.

25 MR. BELLAK: I don't know who that's not

1 at the table wants to speak. So --

2 MR. BRYANT: My name's Bill Bryant
3 representing Enron. And I'll reserve comment.

4 MR. JENKINS: My name is Joe Jenkins. I'm
5 with the PSC staff.

6 MR. BASFORD: I'm Dick Basford
7 representing Enron. I have no comments.

8 MS. HERSHEL: Michelle Hershel. I'm with
9 Florida Electric Cooperative Association. In
10 particular, two of my members, Peace River
11 Electric Cooperative and Seminole Electric
12 Cooperative.

13 We have not intervened, but we are
14 planning a petition to intervene.

15 MR. BELLAK: Any other comments from
16 anyone?

17 Any other comments from those who have
18 already spoken?

19 I guess that's it then. I guess we can
20 adjourn.

21 (Discussion off the record.)

22 MR. BELLAK: Okay. We apparently have all
23 of our ducks in a row, and I appreciate the --
24 the input we've gotten. I don't know that we
25 have anything more to do at this particular

1 meeting.

2 I have to discuss this aspect of the case
3 with the prehearing officer, who is
4 Susan Clark. And we will speedily come to a
5 conclusion as to how to handle this
6 procedurally. And commence whatever further
7 processing of these declaratory statements is
8 entailed.

9 MR. WILLIS: Could I just add a couple of
10 remarks to what my colleague, Mr. McWhirter,
11 said?

12 This case is not going to determine
13 anybody's substantial interests, other than
14 IMC's 97-1313. This is a case that involves
15 whether the -- as John put it, any customer in
16 Florida has a right under law to
17 self-generate.

18 The question here is whether the business
19 structure that IMC proposes to use to implement
20 its self-generation plants is a retail sale
21 making some party to it a public utility, or
22 nonjurisdiction self-generation.

23 Secondly, as -- just as to the pure
24 procedural issue, the petitions for declaratory
25 statement, and declaratory statements

1 themselves, are exactly what they are.
2 Petitioners asked the Commission, based on a
3 set of alleged facts -- or asked any Agency,
4 based on a set of alleged facts, what the legal
5 conclusion applying to the Agency's statutes
6 and rules to those facts will be.

7 The agency grants or denies the
8 declaratory statement, or -- you will recall,
9 sometimes a declaratory statement is declared
10 to the negative, and you get the opposite of
11 what you want.

12 Just as a pure legal procedural matter,
13 that's -- that's really all that's going on
14 here. And we -- we'd submit to you that we've
15 alleged extensive facts with probably more
16 particularity than that that was alleged in the
17 other cases that are -- on similar or nearly
18 the same subject matter that the PSC has
19 decided by declaratory statements.

20 MR. LONG: Well, I think, you know, the
21 heart of the matter here is the question of
22 whether IMC ultimately will bear all of the
23 risks of ownership. And I would submit that
24 none of the facts that have been asserted make
25 that demonstration.

1 I think IMC's position, Duke's position is
2 to have the Commission assume the validity of
3 these assertions and proceed to issue a
4 declaratory order.

5 But I doubt very seriously that either
6 Duke or IMC are prepared to come back to this
7 Commission once they have actually put their
8 deal together and -- and have those assertions
9 tested.

10 And the point is, if those assertions are
11 not tested, and they go ahead and build the
12 plant, the damage is done. And the damage
13 certainty to Tampa Electric would be
14 significant, as we have outlined in our
15 petition to intervene.

16 The Commission, if it does not require
17 these companies to be specific about their O&M
18 agreement, their partnership agreement, and all
19 the other key agreements that will define the
20 risks and reward to the party, then the
21 Commission may well lose control.

22 Mr. McWhirter says that his view is that
23 this -- this proceeding is nonpreceidental, it
24 applies only to IMC. However, I find that a
25 little bit inconsistent with his reliance on

1 Monsanto and -- and Seminole, which were also
2 declaratory proceedings.

3 And I think the lesson is quite obvious
4 that this matter -- whether the Commission
5 intends it to be or not, will be precedential.
6 And given that fact, I just don't think the
7 Commission can afford to take these assertions
8 at face value.

9 MR. McWHIRTER: Let me ask learned counsel
10 a question. IMCA already produces
11 120 megawatts of power. And you've never had
12 any trouble with it before when we sought
13 self-generation.

14 What is it -- and you didn't seek the
15 arrangements that we had with the developer
16 under those circumstances, you didn't seek what
17 kind of performance and guarantee requirements
18 we had with the manufacturer.

19 Why is it all of a sudden that this case
20 has become important, when it wasn't important
21 before?

22 MR. LONG: Well, because we don't think
23 this is a case of self-generation. That's the
24 issue.

25 MR. McWHIRTER: And, clearly, if IMCA were

1 funding it itself without -- through a
2 developer without the participation of depths,
3 then you would have no complaint whatsoever?

4 MR. LONG: Well, you bring up a very good
5 point, and one that ties into a suggestion that
6 we had to make.

7 It seems to me in addressing IMC's
8 petition, as we've said, ultimately the
9 Commission has to see final contract language.
10 But even before you get to that stage, it seems
11 to me that the Commission might do well to
12 define the guidelines and criteria that
13 distinguish self-generation from a retail
14 sale.

15 In its past orders, the Commission has
16 focused primarily on the incidence of ownership
17 and whether risk resides. But we think under
18 that very broad umbrella, there are many
19 significant -- specific inquiries that need to
20 be made to make that ultimate judgment.

21 And in our view, one way that the
22 Commission might proceed would be to bifurcate
23 this -- this action, and have Phase I attempt
24 to establish the guidelines so that IMC would
25 have clear guidance, and the parties would have

1 clear guidance.

2 And in a second phase, when they have
3 completed the details of their arrangement, we
4 can then look at whether that final arrangement
5 is consistent with the guidelines.

6 MR. McWHIRTER: I think one of the reasons
7 the statutes set out 90 days for action is to
8 prevent obstructionism and barriers to
9 proceeding with a legitimate legal question
10 that's really not a factual issue, but a legal
11 issue.

12 And it seems to us that you're -- what
13 you're saying is, let's have two proceedings,
14 and stretch them out over -- how long a period
15 of time did you have in mind, Harry?

16 MR. LONG: And how long's it going to take
17 you to negotiate your contracts?

18 MR. McWHIRTER: Well, the contract is in
19 the process of negotiation, and it could be
20 reformed if the Commission sees some specific
21 issues that give it concern about risk issues,
22 or other issues that would make it retail
23 competition.

24 MR. KESSEL: I think -- I think that
25 that's a judgment that -- that you started this

1 proceeding, and, obviously, you're the one that
2 ultimately has to answer that -- answer that
3 question as to how long it's going to take.

4 MR. KESSEL: You clearly have some concern
5 with the dimensions of the project given the
6 fact that you did come in for declaratory
7 relief. You indicated that -- that there are
8 no issues of law and issues of fact.

9 We submit to you that there are issues of
10 law here, that it is necessary to develop a
11 more specific criteria with respect to what
12 constitutes ownership of purposes of
13 self-generation.

14 And the concept of a bifurcated proceeding
15 would be to use Phase I, perhaps in a one-day
16 hearing, a 120.57(2) hearing, to -- to develop
17 those criteria, to give the parties that are
18 affected an opportunity to present to the
19 Commission more specific criteria that ought to
20 be applied in the determination that's being
21 sought.

22 It's really hard to say whether or not
23 there are issues of fact here, or simply a
24 failure to present sufficient facts to make a
25 determination.

1 But we'd submit to you that the major
2 steps would be taken if it were -- if the
3 hearing -- the proceeding were bifurcated so
4 that at least there could be appropriate
5 joinder on -- given this particular product,
6 and the generalized description that was
7 presented in the petition, what criteria, what
8 to be applied -- the criteria. And then it's
9 really your call as to whether you come back
10 and want that additional comfort as to whether
11 or not the deal actually comports with those
12 criteria.

13 MR. McWHIRTER: Mr. Kessel, the problem
14 with your proposition is that you're converting
15 a declaratory petition proceeding, which
16 doesn't establish policy, into a rulemaking
17 proceeding, which Commission policy is,
18 in fact, established.

19 And we don't have any objection to the
20 Commission developing a rulemaking proceeding
21 independent of our petition.

22 In fact, you have a merchant plant
23 workshop in process, and that might be the area
24 to do it because every utility in the state
25 ought to be able to participate, and not just

1 those who -- for whom IMC Agrico is presently a
2 customer.

3 So I would suggest to you that the
4 declaratory statement could go forward in your
5 rulemaking policy, and if the Commission wants
6 to make law and establish criteria for its
7 self-generation, could go on independently in
8 another proceeding.

9 MR. LONG: Well, you, as premised on a
10 motion, that a petition for declaratory relief
11 is the appropriate vehicle, which I think is
12 also open to question.

13 MR. KESSEL: The fact of the matter is
14 that the allegations in the petition are
15 inadequate to support a finding that there is
16 no retail sale by Duke, and that there is
17 sufficient attributes of ownership so that one
18 can reach a conclusion that IMCA is engaged in
19 that -- in true self-generation.

20 We're submitting to you that given the
21 general description in your exhibit as to the
22 limited partnership and how that's going to be
23 constituted, that it's very appropriate for the
24 Commission to articulate certain standards with
25 respect to equity contributions, with respect

1 to lease attributes, and with respect to the
2 other -- the other attributes of ownership, the
3 assignment of risk, the cash flows, and what
4 have you, that more specific criteria could be
5 developed to provide you the interpretive
6 relief that you want to guide your project.

7 There's nothing, as far as I know, in the
8 declaratory statement rules that require a yea
9 or nay.

10 And in this particular case, you're asking
11 that the -- that approval be given on the basis
12 of a petition that is willfully and lacking in
13 the specific details necessary for the
14 Commission to give a -- a responsible -- make a
15 responsible determination.

16 MR. McWHIRTER: Do you agree with Mr. Long
17 and myself that IMC Agrico has no obligation to
18 buy electricity from Tampa Electric Company,
19 and the only issue is whether the procedure
20 that we've established for instructing our
21 self-generation project is, in fact,
22 self-generation, and not something else?

23 MR. KESSEL: The legal issue is whether or
24 not it is a retail sale involved, or whether
25 there is self-generation.

1 MR. McWHIRTER: And so the business
2 structure -- you're saying the business
3 structure is one that would create a retail
4 sale as opposed to self-generation, and that's
5 the only issue before the Commission.

6 MR. KESSEL: We are saying, based upon the
7 allegations in the petition, that there is --
8 there are insufficient facts alleged which
9 would permit a determination that the project
10 constitutes self-generation.

11 MR. McWHIRTER: And is there some basis
12 that sets the precise facts that have to be
13 alleged in order to support a petition for
14 declaratory statement, in your opinion?

15 MR. KESSEL: We submit to you that a -- a
16 more -- that criteria can be developed to be
17 applied to the -- the particular -- the
18 specific project which is proposed, which would
19 provide guidance to you, the interpretive
20 relief that you want, and in fashioning and
21 designing your project.

22 MR. WILLIS: Not only that, you said it
23 yourself that, you know, alleged with
24 particularity what your individual circumstance
25 is. And what that means is it means something

1 different in different kinds of cases.

2 And what we're -- we're saying is that the
3 various high level attributes of the
4 transaction that you outline in very broadbrush
5 is not sufficient to meet that -- that
6 criteria.

7 MR. MCGLOTHLIN: Well, most of TECO's
8 comments stem from their proposition that IMCA
9 has not adequately described the project. But
10 in terms of consistency, which has been
11 discussed a lot, it is TECO who is
12 inconsistent, because it was TECO who relies on
13 the facts that we've presented to fashion an
14 argument that somehow our situation should be
15 differentiated factually from the Seminole
16 case.

17 But moreover, all of those comments get
18 ahead of the game, because we have proposed
19 their petition to intervene on the basis that
20 they don't have standing. And in terms of
21 precedential value, I think one aspect of the
22 prior cases in which parties have attempted to
23 intervene in the declaratory statement that is
24 pertinent here is that facts that Gulf Power
25 wanted to intervene to the Monsanto's type of

1 statements, are alleged in the same type of --
2 even though they're -- and the Commission
3 decided that was insufficient to establish
4 standing. And we've raised that here.

5 And so when TECO talks about bifurcating
6 the case, you know, they're -- they haven't yet
7 established they have any ability to
8 participate, much less to insist that our
9 declaratory statement case be handled in favor.

10 MR. LONG: Well, I'd just like to read
11 from a BIO-GEN decision where the Commission
12 addressed this point. It says: The Commission
13 enjoys considerable discretion in deciding who
14 may participate in a declaratory statement
15 proceeding, in the form that that participation
16 will take. Monsanto carries no precedential
17 value here.

18 This is addressing Florida Power.

19 Florida Power is not petitioned to
20 intervene in this case, and there are no
21 disputed issues of material fact that would
22 require its participation.

23 Our understanding of the issues raised in
24 the petition will not be enhanced by
25 consideration of Florida Power's answer.

1 Well, you know, I would submit that unlike
2 Florida Power in that proceeding, we have
3 petitioned to intervene. I think that we have
4 demonstrated in our pleadings that a great deal
5 of necessary information would be added to the
6 record if we were, in fact, allowed to
7 intervene.

8 So again, I think if -- if we want to look
9 at these prior declaratory orders as precedent,
10 it supports our ability to intervene in this
11 proceeding, and to act as a full participant.

12 To the extent that we're going to regard
13 these prior declaratory orders as being
14 nonprecedential, then they're beside the fact.

15 MR. McWHIRTER: Harry, you're talking
16 about a bifurcated proceeding.

17 MR. LONG: Yes.

18 MR. McWHIRTER: The first proceeding, as I
19 understand it, would be a rule proceeding in
20 which the Commission would develop the rules
21 for the criteria for self-generation?

22 MR. LONG: No. Basically what we had in
23 mind is that the Commission would determine the
24 guidelines. In other words, expand on the
25 current guideline that the full risk of

1 ownership has to reside with the petitioner.

2 We think that -- that there are a great
3 many specific tests and inquiries need to be
4 made in order to make that ultimate judgment.
5 As you well know, in the partnership agreement,
6 the O&M agreement, other site agreements, there
7 is unlimited potential to shift risk away from
8 IMC in the ways that are not obvious to the
9 casual observer.

10 And our point is that the Commission must
11 be aware of the details of the arrangement.
12 And as a first step to that, it would be
13 helpful to all of us if the Commission could
14 articulate, with input from the parties, what
15 those guidelines ought to be.

16 MR. McWHIRTER: What you're saying is for
17 every self-generation project, you have to have
18 a pigeonhole. And unless it fits in this
19 pigeonhole that's established through these
20 criteria, that it won't work?

21 MR. KESSEL: No. What we are saying -- if
22 I might respond to that -- is either you --
23 we've got to go to the next level of developing
24 the criteria to be applied to this specific
25 project, and then go the next step, if you want

1 all the relief you want, and compare the actual
2 development of the documentation of those
3 criteria.

4 Or in the alternative, fold your tent and
5 go home. You're here too early. You haven't
6 defined fully your deal, and you're asking for
7 a declaratory judgment. And I would submit to
8 you that that's unfair.

9 MR. McWHIRTER: What kind of pleadings
10 would you submit to the Commission when you
11 went into the joint venture for the Hardee
12 power plant? You came in with a certificate of
13 need. You didn't come in with an approval of
14 the business structure, did you?

15 MR. KESSEL: We would submit to you that
16 that project did not involve the issue of -- of
17 retail -- unauthorized retail service.

18 MR. McWHIRTER: Now, with respect to
19 retail service, it would appear to me that the
20 issue is, are customers somewhere being
21 required to pay for this plant. And there's no
22 way that we have requested in our petition that
23 any customer of Tampa Electric, or any other
24 utility, be required to pay for this plant.
25 The entire risk of the plant lies on

1 IMC Agrico.

2 And to the extent that that risk is shared
3 with the developer, and its merchant portion of
4 the plant, then it has its share of the risk.

5 But --

6 MR. LONG: But isn't that irrelevant?

7 MR. McWHIRTER: That's where the public
8 interest lies.

9 MR. LONG: But isn't that --

10 MR. McWHIRTER: Protecting the public.

11 MR. LONG: But isn't that irrelevant to
12 the question of whether or not there's a retail
13 sale going on here?

14 MR. McWHIRTER: That's what the retail
15 sale is all about.

16 MR. LONG: Well, I don't quite agree with
17 that.

18 MR. McWHIRTER: Do we have an obligation
19 to buy it from you? And the law is, no, we
20 don't have an obligation to buy it from you.

21 The next aspect of retail sale is if a
22 utility is in the utility business, and
23 customers are going to be -- some other people
24 are going to be asked to pick up the loss, then
25 the Commission's interested in that.

1 In our case, nobody has asked to pick up
2 the loss, and there's nothing in the record
3 that indicates that anybody is asked to pick up
4 the loss.

5 So from a procedural thing, establishing
6 some kind of criterion that must develop a
7 pigeonhole and take away all flexibility in
8 construction of power plants that customers
9 might want to come up with for all time, we
10 think would be an exercise in futility. That
11 would quickly become obsolete as technology
12 changes.

13 MR. WILLIS: But the question is whether
14 there's a retail sale. And under the
15 P.W. Ventures case, there only has to be one,
16 and that is between the separate entity and
17 IMC Agrico. One -- you have -- you have set up
18 a separate legal entity to which -- which will
19 transfer power back to IMCA. That should raise
20 a flag here.

21 Then you have undertaken to have some sort
22 of a relationship with that -- that entity,
23 which we have alleged is less than a unit of
24 interest in the project. It's not -- you're
25 not the sole general partner, you're not --

1 there are a number of things that are
2 different. And then there are numerous ways
3 within which risk can be shifted from the
4 customer to this other entity, where, in fact,
5 what is occurring is a retail sale.

6 And the universe of factors to be
7 considered are not the ones that you have --
8 have alleged in your -- your petition. And
9 those are what need to be -- they -- the
10 Commission needs to be aware of what all those
11 things should be, and then test your deal
12 against all those various factors. And that's
13 what we want --

14 MR. McWHIRTER: I think the appropriate
15 procedure, Lee, would be for you to file a
16 petition with the Commission to establish
17 rulemaking procedures in which all utilities in
18 the state could come in and determine what it
19 is that makes a self-generation plant, and what
20 it is that makes a -- a retail sale of
21 electricity by a utility.

22 And that proceeding should have plenty of
23 study, and take as much time as you want to do
24 it. But I don't see any justification for
25 halting the process that we have underway, that

1 we've had underway for a year-and-a-half now,
2 trying to reach a logical conclusion that
3 conforms with what the Commission has done in
4 the past.

5 MR. KESSEL: We submit that the basic
6 issue, as you did in your -- in your petition,
7 is whether or not there's a substantial
8 identity of interest between IMCA and -- as
9 lessee, and -- and the project and ownership in
10 the project. And it's perfectly appropriate to
11 review this on a project specific basis.

12 Each project is different, the parties
13 vary. The financial, operating, and other
14 relationships are unique to each one. You've
15 asked for a declaratory judgment. We're --
16 we're indicating that you've got to provide
17 more details in order to -- in order to make a
18 determination as to whether or not IMCA,
19 in fact, owns the capacity that it's -- it's
20 buying, or whether or not another entity is,
21 in effect, providing retail service.

22 And we've suggested to help the process of
23 bifurcating it and to establish some criteria
24 specific to this particular project to guide
25 the Commission in making that determination.

1 MR. McWHIRTER: I haven't heard any
2 time line. What time line did y'all have in
3 mind for the bifurcating process? In less than
4 five years?

5 MR. KESSEL: I think the answer is is that
6 the development of the specific criteria could
7 well be done within the 90-day period.

8 Then the issue is the ball is back in your
9 court as to how long it's going to take you to
10 make the factual -- the factual submission.

11 MR. McWHIRTER: So you're prepared to come
12 in, and by December 16th have the -- your idea
13 of what the criteria are ready for submittal to
14 the Commission?

15 MR. KESSEL: I think if the Commission
16 called a hearing, we could be prepared by that
17 date.

18 MR. BELLAK: I'm sorry. Could you repeat
19 that again?

20 MR. McWHIRTER: He says that within
21 90 days -- within the 90-day time frame, which
22 began on October 10th, that criteria could be
23 established.

24 The problem with that approach, of course,
25 is that the criteria might be established in

1 this particular case, but declaratory statement
2 is not a policy-making procedure, other
3 utilities haven't had an opportunity to
4 participate in what would be a policy-making
5 proceeding. And it would slow down this
6 particular case.

7 And if the Commission doesn't have a
8 policy on what self-generation is, and we can't
9 use, as you say, Harry, previous declaratory
10 statements for the criteria, then this case can
11 stand on its own.

12 And we have pointed out the -- what we're
13 doing with clarity. There's no -- no one has
14 disputed what we're doing. We're just saying
15 if you want to know more, you want to get into
16 our confidential information.

17 And we're saying that the petitions,
18 standing on their own, present a development
19 that we think is a viable development, and the
20 Commission can deal with that.

21 MR. LONG: Well, and I guess we just
22 disagree with the assertion that there are no
23 policy issues to your petition. I mean, that's
24 why you have a room full of people here,
25 because there are very significant and

1 far-reaching policy implications associated
2 with your request.

3 MR. MCGLOTHLIN: Are we through again?

4 MR. BELLAK: I don't know if we have any
5 other comments or --

6 MR. MCGEE: One thought that crossed my
7 mind about, you know -- I don't know whether
8 this is appropriate or not, but I notice you
9 have a lot of people here who probably have an
10 interest in the companion docket. I don't know
11 if that's the right term. The 97-1337 docket
12 that deals with, and some of the procedural
13 concerns that you've raised here that may or
14 may not, depending on how you look at it, have
15 some application in that other docket.

16 Would there be any benefit in terms of
17 efficient use of people's times and economy and
18 those sorts of things of discussing the same
19 things for that docket?

20 MR. BELLAK: I have no objection to it.
21 If -- if you would like to.

22 MR. MCGEE: I think there were a couple of
23 comments that we had -- at least I think there
24 were a couple comments. But Gary Sasso
25 probably would be the best one to address

1 that.

2 MR. SASSO: Again, Gary Sasso of Carlton,
3 Fields.

4 Some of the statements that have been made
5 today about the appropriate role of a
6 declaratory statement hit home in the other
7 docket.

8 Obviously a declaratory statement is a
9 vehicle by which a regulated party can ask an
10 agency that regulates it for some clarification
11 of its own rights and responsibilities,
12 vis-a-vis that agency. It is not intended to
13 be.

14 That means by which a party can get a --
15 an interpretation of a significant rule or --
16 or issue of policy that has ramifications for
17 other parties. And may have statewide
18 applicability.

19 And, of course, in the other docket, Duks
20 is seeking exactly that kind of relief. It's
21 essentially seeking a determination whether the
22 Commission can or should receive from the
23 current law as stated in Nassau, Florida
24 Supreme Court decision.

25 So we have some grave misgivings about

1 whether a declaratory statement proceeding is
2 an appropriate vehicle for entertaining those
3 issues.

4 And Florida Power does intend to seek
5 intervention in that proceeding. But, again,
6 believes that the declaratory statement format
7 is inappropriate for addressing those issues,
8 and believes that there ought to be a 120.57
9 type proceeding used to allow all interested
10 parties an opportunity to participate in what
11 is a very significant statewide policy issue
12 raised by the petition in that -- in that
13 matter.

14 MR. BELLAK: Okay. Well, I'd submit to
15 you that that 97-1337 is a straight-up petition
16 for declaratory statement that asks the
17 significance, is it fair, the relationship with
18 the entities involved to the Commission in its
19 rule as the administrator of Section 403.529.

20 MR. McWHIRTER: As I understand it, that
21 petition is only to ask the Commission if we
22 can follow the one-stop shopping process that's
23 provided under the Power Plant Siting Act,
24 period.

25 MR. WRIGHT: Well, actually, that's pretty

1 technically correct. It's whether the people
2 in the -- we can initiate a need determination,
3 which everybody in the room probably knows is a
4 prerequisite to the proceeding under the Power
5 Plant Siting Act, which I think, everybody
6 knows -- at least in terms of stated positions,
7 would let us use that process. And the
8 Department has indicated that they would let us
9 use the site certification process if the
10 Commission will use the determination.

11 MR. SASSO: If I might expand on my
12 comments, in view of some of these comments.

13 It's real important that this issue of
14 applicant status not be viewed in a vacuum.
15 The Power Plant Siting Act is not something
16 that can be looked at in isolation as a view to
17 create economic opportunities for plant
18 development.

19 It's part of an intricate framework of
20 statutory and regulatory regulation of the
21 provision of electric service in the state.

22 And it was enacted as part of the same
23 legislation that created the ten-year site plan
24 review process. And this pattern of statutory
25 and -- and regulatory treatment of this

1 industry contemplates that there's going to be
2 a certain role for the Commission to assure
3 adequate and reliable service. And it
4 contemplates that that will be carried out
5 through regulated entities. And the
6 Power Plant Siting Act is a means by which the
7 Commission discharges that responsibility
8 through regulated entities.

9 And that is the reason that -- that we
10 have Nassau, that's the background of the
11 Nassau decision. It's simply a recognition of
12 the important role, and the unique role, that
13 regulated public utilities play in this state.

14 And of the fact that the Commission
15 regulates and discharges its obligation for
16 adequate service through these utilities.

17 And essentially, I mean, we can --
18 you know, downplay what -- what Duke is seeking
19 in that case, but it's not simply to be given
20 a -- a declaration that affects only its
21 interest, but it's really a transformation of
22 the regulatory framework here. And whereas the
23 utilities -- the public utilities in the state
24 now occupy a unique position in this
25 framework. Duke essentially means to change

1 all that.

2 And quite frankly, in its petition asks
3 the Commission to interpret Florida
4 Supreme Court precedent. It's obviously at
5 issue in this case.

6 And to say that this involves simply an
7 isolated issue of importance only to Duke is to
8 really bury one's head in the sand.

9 The Commission staff held a workshop in
10 which many people participated quite
11 vigorously. These issues are obviously of
12 great importance to many people of this state.

13 MR. McWHIRTER: One unrelated subject.
14 The Commission has ex parte rules with respect
15 to furnishing notice of the tenor of
16 conversations that are had. And you indicated
17 a lot of people had inquired of your
18 department.

19 I -- for a procedural matter, I think it
20 would be helpful when people do contact you,
21 you notify the other parties and --

22 MR. BELLAK: Well, we have a staff contact
23 rule, and neither the staff contact rule nor
24 the ex parte rule in the statute, which is --
25 I think it's 350.042 -- both of them exempt

1 declaratory statement proceedings.

2 So I'm not assuming that those -- either
3 the statute or the rule has any applicability.

4 MR. McWHIRTER: And the procedure in this
5 case, then everyone can privately talk to the
6 staff without notice to anyone else while
7 you're making your decision?

8 MR. BELLAK: Well, it's not my decision.
9 All I'm doing is forwarding some
10 recommendations to the Commission, who will
11 make the decision. And they are also exempt
12 from the ex parte prohibition because a
13 declaratory statement is involved.

14 And my -- guessing off the top of my head
15 as to the reasoning behind that distinction, it
16 occurs to me that because it's purely a legal
17 determination, and everybody is entitled to
18 forward their opinion of legal determination.

19 There isn't a factual dispute, per se, at
20 least at first blush, involved in a declaratory
21 statement proceeding.

22 I know that some commenters are saying
23 that that's the reason this goes beyond that,
24 and I understand that. But I'm just trying to
25 reason as to why that's exempt.

1 MR. McWHIRTER: Okay. But there's no
2 prohibition against you notifying the
3 participants in the case of the contacts that
4 have been made so that we can respond
5 intelligently to --

6 MR. BELLAK: Well, there's no
7 prohibition. But unless I -- unless it's
8 required, I wouldn't get into it, because I'd
9 have to retroactively go back and think about
10 every conversation I've ever had with anybody
11 about this.

12 MR. McWHIRTER: Well, we could do it from
13 this day forward satisfactorily.

14 MR. BELLAK: I know. But I think that
15 would be vitiating the intent of excluding it.
16 I think if the Legislature wants to exclude it
17 in the statute, or the Commission wants to
18 exclude it by rule, they tell us.

19 And if they don't, then I've got to assume
20 they don't want us to.

21 Well, if there are no other comments, this
22 has been extremely helpful, and appreciated by
23 me particularly. I'm glad that Joe Jenkins had
24 a chance to hear most of it. I'm sure that he
25 appreciates it very much, too.

1 And if there are no further comments,
2 I guess we'll adjourn.

3 Thank you all.

4 (The informal meeting/workshop was
5 concluded at 2:06 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA:

COUNTY OF LEON:

I, LAURIE L. GILBERT, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated; and the foregoing pages numbered 1 through 49 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 19TH day of NOVEMBER, 1997.

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